

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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COMMUNICATION FROM THE INTERNATIONAL MONETARY FUND

The Role of the Fund in the Area of Services
Under its Articles of Agreement

The attached communication is circulated at the request of the International Monetary Fund to the members of the Group of Negotiations on Services.

GATT SECRETARIAT

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INTERNATIONAL MONETARY FUND

The Role of the Fund in the Area of Services
Under its Articles of Agreement

Introduction

1. The Fund has an interest in the services sector not only because it recognizes the growing importance of that sector in the world economy but also because it has been given jurisdiction and responsibilities with respect to certain aspects of services by its Articles of Agreement. ^{1/} The purpose of this note is to describe the areas of jurisdiction and responsibility of the Fund, to give some broad indications about the jurisdictional conflicts that might arise between provisions of the Articles of Agreement of the Fund and provisions of any international agreement concerning trade in services resulting from the current Uruguay Round (services agreement), and to make tentative suggestions regarding the avoidance of such conflicts.

I. Jurisdiction and Responsibilities of the Fund

2. The areas of jurisdiction and responsibility of the Fund are specified in the Fund's Articles of Agreement.

3. The jurisdiction of the Fund includes the authority to oversee the international monetary system and the obligation of each member to collaborate in respect thereof with the Fund and other members; it also includes the authority to approve exchange restrictions, discriminatory currency arrangements and multiple currency practices. In the exercise of its jurisdiction, the Fund has the power to find a member in breach of its obligations under the Articles of the Fund.

4. In view of its broad purposes, the Fund has responsibilities towards its members which extend beyond the area of its jurisdiction. Its purposes are, inter alia, to facilitate the expansion and balanced growth of international trade, and to give confidence to members by making the general resources of the Fund temporarily available to them

^{1/} Unless otherwise indicated, references in this note to Articles and Sections are references to Articles and Sections of the Articles of Agreement of the Fund.

under arrangements with adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity. These purposes guide the Fund's decisions and policies on its financial assistance to its members. Members' adjustment programs aimed at improving their internal and external economic balances which are supported by Fund arrangements therefore often include trade related policies.

A. Jurisdiction of the Fund

5. The Fund has jurisdiction in two broad areas, namely:

(a) the area of exchange restrictions, discriminatory currency arrangements and multiple currency practices (Article VIII, Sections 2(a) and 3); and

(b) the area of surveillance over the international monetary system and the obligation of each member to collaborate in respect thereof with the Fund and other members (Article IV, Section 3(a)).

a. Article VIII Jurisdiction

6. Of the authority provided to the Fund by Article VIII, only the authority to approve exchange restrictions will be discussed. The Fund's Articles provide, inter alia, that no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions (Article VIII, Section 2(a)). ^{1/} The guiding principle in ascertaining whether a measure is a restriction on payments and transfers for current transactions is "whether it involves a direct governmental limitation on the availability or use of exchange as such." ^{2/} In exercising its authority, the Fund must determine whether a governmental measure

^{1/} Specifically, Article VIII, Section 2(a) provides that, subject to the provisions of Article VII, Section 3(b) and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions. Article VII, Section 3(b) addresses the case where the Fund has formally declared the currency of a member to be scarce; the Fund has not yet made such a declaration. Article XIV, Section 2 provides that a member that has notified the Fund that it intends to avail itself of transitional arrangements under this provision may maintain and adapt to changing circumstances the restrictions on payments and transfers for current international transactions that were in effect on the date on which it became a member.

^{2/} Decision No. 1034-(60/27), adopted June 1, 1960; Selected Decisions, Fourteenth Issue, page 299.

involves a restriction, on the one hand, and whether that restriction should be approved, on the other hand.

7. Both the Fund's Articles of Agreement and the General Agreement on Tariffs and Trade (GATT) determine the respective jurisdictions of the Fund and the GATT. There are instances, however, in which the jurisdiction of the Fund and the jurisdiction of GATT overlap. In particular, some governmental measures impose both exchange and trade restrictions. By exercising its jurisdiction to withhold or to terminate its approval of such "mixed measures," the Fund could in effect exercise control over measures that are also trade restrictions; however, members may find it possible to amend their measures so that trade restrictions are sufficiently distinguished from exchange restrictions.

8. To fall within the Fund's jurisdiction with respect to exchange restrictions, a restriction must be on payments or transfers for current international transactions. The concept of "payments for current transactions" is defined by Article XXX(d) as:

"payments which are not for the purpose of transferring capital, and includes, without limitation:

- (1) all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities;
- (2) payments due as interest on loans and as net income from other investments;
- (3) payments of moderate amount for amortization of loans or for depreciation of direct investments; and
- (4) moderate remittances for family living expenses.

The Fund may, after consultation with the members concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions."

9. It follows that payments for current transactions for both goods and services are covered. The list of transactions in Article XXX(d) is not limitative. Moreover, the topics are general in their terms; for example, "services" is a broad category which covers transactions that are not specifically mentioned, such as payments due under international consulting or civil works contracts, insurance policies or shipping contracts.

10. The concept of "payments for current transactions" has been understood in the practice of the Fund to include the provision of some

financial services ("normal short-term banking and credit facilities") for the making of such payments if such services are normally provided.

b. Article IV Jurisdiction

11. Pursuant to Article IV, Section 3(a), the Fund must oversee the international monetary system in order to ensure its effective operation, and must oversee the compliance of each member with its obligations under Article IV, Section 1. Under the latter provision, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates.

12. In practice, the Fund has concentrated mainly on its duties to exercise firm surveillance over the exchange rate policies of members, and to adopt specific principles for the guidance of all members with respect to those policies (Article IV, Section 3(b)). The Fund exercises firm surveillance in the recognition that "the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services and capital among countries, and that sustains sound economic growth..." (Article IV, Section 1).

13. The Fund's appraisal of a member's exchange rate policies is to be made "within the framework of a comprehensive analysis of the general economic situation and economic policy strategy of the member," 1/ including the member's trade policies. More specifically, "the introduction, substantial intensification, or prolonged maintenance, for balance of payments purposes, of restrictions on, or incentives for, current transactions" (i.e., not only the payments for such transactions but the transactions themselves) must be considered by the Fund as a development that might indicate the need for discussion with the member concerned. 2/ Thus, in their coverage of trade policy issues, Article IV consultations emphasize, in particular, analysis of the effects of the member's trade policy stance on domestic adjustment and on its trading partners. While the coverage and analysis of trade policy matters in Article IV consultation reports has grown over the years, the Fund has been careful to avoid overlap or conflict with the jurisdiction of the GATT.

1/ Surveillance over Exchange Rate Policies, Decision No. 5392-(77/63), adopted April 29, 1977, as amended by Decision No. 8564-(87/59), adopted April 1, 1987; Selected Decisions, Fourteenth Issue, pages 12-13.

2/ Surveillance over Exchange Rate Policies, ibid., page 12.

B. Responsibilities related to the Use of the Fund's Resources

14. Although the Fund's jurisdiction does not extend to trade in goods and services (except as mentioned above in paragraphs 10 and 13), such limitations do not apply to the provision by the Fund of its financial assistance, including policy conditions that accompany such assistance. In providing its general resources to members, the Fund must follow its rules for the use of such resources, such as the requirement that their use be temporary and subject to adequate safeguards. Included in the economic policy conditions that are taken into account by the Fund in providing general resources to a member are trade measures and policies. The inclusion of trade measures and policies by the Fund is justified by the purposes of the Fund referred to in paragraph 4 above. For instance, a member that follows trade policies that are "destructive of national or international prosperity" is more likely to aggravate economic maladjustments than to correct them; such policies may also increase the likelihood that the use by such member of Fund resources will not be temporary.

15. In view of the foregoing, Fund arrangements for the use of the Fund's general resources contain a standard clause on trade whereby purchases of Fund resources may not be made if the member imposes or intensifies import restrictions for balance of payments reasons. Moreover, in some cases specific trade measures are incorporated in Fund-supported programs. The coverage of trade issues has increased in stand-by and extended arrangements approved in recent years, and most programs in support of arrangements under the structural adjustment facility have incorporated specific trade liberalization measures.

II. Potential Conflicts between a Services Agreement and the Articles

16. Members of the Fund which are also parties to the GATT are bound by their obligations under the provisions of both the Fund's Articles and the GATT. The GATT was drafted so as to ensure that it would not be in conflict with the Fund's Articles. It will be important to ensure that conflicts are also avoided under international agreements concerning services. If a services agreement contained provisions that were incompatible with the Articles of the Fund, complex questions of application of the services agreement in light of the Articles would arise.

17. Article 30 of the Vienna Convention on the Law of Treaties sets rules for resolving conflicts arising in the application of successive international agreements relating to the same subject matter. These rules provide inter alia that when a treaty (such as a services agreement) specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier treaty (such as the Fund's Articles) the provisions of the earlier treaty prevail. The rules also provide that when the parties to the later treaty (i.e., the

services agreement) do not include all the parties to the earlier one (i.e., the Articles):

(a) as between the states parties to both treaties, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty; and

(b) as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations.

However, regardless of the effects of a new treaty as between the parties thereto, the imposition of exchange restrictions pursuant to that treaty between Fund members, without Fund approval, would constitute a breach of obligation under the Fund's Articles.

18. In drafting a services agreement, these rules will need to be taken into account. It is obvious that a conflict between a services agreement and the Articles could result in a disorderly situation. Such conflict cannot be ruled out. For example, a services agreement covering financial services could cover "normal short-term banking and credit facilities," which come within the Fund's jurisdiction. ^{1/} A restriction on the provision of such facilities would require Fund approval.

19. Conflicts could also arise due to the fact that members of the Fund are obligated not to engage in any discriminatory currency arrangements, except as authorized by the Fund's Articles or approved by the Fund (Article VIII, Section 3). The adoption under or pursuant to a services agreement of preferential exchange rules for Fund members that are parties to that services agreement would constitute a discriminatory currency arrangement under the Fund's Articles in respect of other Fund members that are not parties to that services agreement. It may be expected that, at least initially, the membership of the services agreement will be significantly smaller than the membership of the Fund. In that case, practically any such adoption of preferential exchange rules would constitute a discriminatory currency arrangement.

20. If safeguard provisions in a services agreement were to permit the introduction or intensification of restrictions on payments for current international transactions for balance of payments or other reasons, such restrictions would require the prior approval of the Fund. For instance, an intensification of service restrictions made effective through exchange restrictions would require Fund approval for Fund members, even if such restrictions were applied on a nondiscriminatory basis.

^{1/} See Article VIII and Article XXX(d); see also paragraph 10 above.

21. Another area of potential conflict is the risk of different definitions of current and capital payments. The Fund's Articles limit the right of members to impose restrictions on the making of payments and transfers for current international transactions (Article VIII, Section 2(a)). In this context, payments for current transactions mean payments which are not for the purpose of transferring capital (Article XXX(d)). Therefore, the limitations of Article VIII do not apply to restrictions on capital transfers. The Fund may, after consultation with the members concerned, determine whether certain specific transactions are to be considered current transactions or capital transactions (Article XXX(d)). In addition, the Fund is authorized to give binding interpretations of the provisions of the Articles (Article XXIX). Consequently, the freedom of the parties to a services agreement to regulate what they regard as capital transactions would be limited by the jurisdiction of the Fund, including its authority to determine that a specific transaction which under the services agreement is regarded as a capital transaction is under the Articles to be regarded as a current transaction covered by Article VIII.

22. To avoid conflicts, services agreements should include provisions to ensure that the Fund's jurisdiction and the role of the Fund in the international monetary system would be respected and that the rights and obligations of Fund members are preserved. One option would be to include in services agreements provisions reflecting the Fund's jurisdiction and, in particular, Fund jurisdiction with respect to certain financial services. The Fund staff would be ready to assist the Group in ensuring that conflicts with the Fund's Articles of Agreement are avoided.